

CFTC Letter No. 97-98**November 10, 1997****Division of Trading & Markets**Re: Rule 4.7(a) -- Request to Treat Investor Limited Partnership as a Qualified Eligible Participant

Dear :

This is in response to your letter dated August 11, 1997 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by letters dated September 17, October 16 and October 31, 1997, a facsimile dated September 23, 1997 and telephone conversations with Division staff. By your correspondence, you request on behalf of the "Adviser", a registered commodity pool operator ("CPO"), relief from the Rule 4.7(a)(1)(ii)(B)(2)(xi)¹ restriction, which would prevent the "Pool" from investing more than ten percent of its assets in other pools for which the CPOs thereof have claimed relief under Rule 4.7 ("Rule 4.7 Exempt Pools"). You also request relief on behalf of the "LP" such that the general partners thereof need not register as CPOs and commodity trading advisers ("CTAs") in connection with their operation of the LP.²

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. The Pool is an investment vehicle which will operate primarily as a "fund of funds." The CPO of the Pool is the Adviser, whose sole owner and employee is A .

The Pool initially will be funded by two sources: (1) A and his wife and certain of A's immediate family members,³ all of whom are qualified eligible participants, as defined in Rule 4.7(a)("QEPs"); and (2) the LP, which has total assets in excess of \$5,000,000 and was not formed for the purpose of investing in the Pool.⁴ The limited partners of the LP are a nonprofit health care facility, certain of A's family members⁵ and five trusts for the benefit of his family members (the "Trusts").⁶ The Y Center and each of the individual participants in the LP are QEPs. The Trusts, however, are not QEPs, although the trustees of the Trusts, all members of A's family, are QEPs.

The Trusts are irrevocable living trusts established by and for the benefit of A's family members for estate planning purposes. Three of the Trusts were established by A's mother for her grandchildren. The other two Trusts were established by A's two uncles for their children. The general partners of the LP are A's grandmother, individually, and X, a corporation wholly-owned by A's grandmother and her three sons (collectively, the "General Partners").

Absent the requested relief, the Adviser will not be able to treat the LP as a QEP because the LP wishes to invest more than ten percent of its assets in the Pool but contains some non-QEP participants. Further, absent the requested relief, the CPO of any Rule 4.7 Exempt Pool could not accept more than ten percent of the Pool's assets as an investment in its pool.

Based upon your representations, as supplemented, it appears that granting the requested relief would not be contrary to the public interest and the purposes of Rule 4.7(a). Accordingly, the Division will not recommend that the Commission take any enforcement action for failure to comply with Rule 4.7 against: (1) the Adviser solely on the basis that the Adviser claims relief pursuant to Rule 4.7(a) notwithstanding an investment by the LP in the Pool which may exceed ten percent of the fair market value of the LP's assets; and (2) the Adviser or the CPO of any Rule 4.7 Exempt Pool in which the Pool becomes a participant based solely upon the Pool's investment of more than ten percent of its assets in a Rule 4.7 Exempt Pool. This relief is, however, subject to the condition that the trustees of the Trusts consent in writing to the Trusts being treated as QEPs.

By investing in a fund (the Pool), which in turn will invest in funds that trade commodity interests (the Rule 4.7 Exempt Pools), the LP itself would be a commodity pool. Absent relief, the LP's General Partners: (1) as general partners of the LP, would be required to register as CPOs; and (2) as the persons who make the investment decisions for the LP, would be required to register as CTAs. In support of relief from CPO and CTA registration on behalf of the General Partners, we note your representations (stated above) concerning the familial relationship among the participants in the LP. Further you represent that: (1) neither General Partner is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act, as amended (the "Act");⁷ (2) the General Partners will provide the limited partners of the LP, upon request, with access to the books and records of the LP; (3) neither General Partner nor any director or officer of the corporate General Partner serves as a CPO of any commodity pool or as a CTA to any other pool; (4) the LP's only commodity interest-related investment is its investment in the Pool; and (5) the LP does not intend to accept any new limited partners.⁸ Based upon the foregoing, the Division will not recommend that the Commission take any enforcement action against either of the General Partners under Section 4m(1) of the Act⁹ based solely upon their failure to register as a CPO or CTA in connection with their services to the LP. This relief is subject to the conditions that the LP not invest in any commodity interest-related investments other than its investment in the Pool and that the LP will not admit any additional limited partners.

We note that this letter relieves the Adviser solely from compliance with certain requirements of Rule 4.7(a) and does not excuse it from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. Similarly, this letter relieves the General Partners solely from the registration requirements of Section 4m(1) of the Act in connection with their operation of the LP. Thus, for example, each remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. 6o (1994), to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and the Adviser remains subject to all other applicable provisions of Part 4.

This letter is based upon the representations provided to us and is subject to compliance with the conditions stated above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of the Adviser, the Pool, the General Partners or the LP change in any way from those represented to us. This letter represents the position of the Division only. It does not necessarily reflect the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Lawrence T. Eckert, an attorney on my staff, at (202) 418-5450.

Very
truly
yours,

Susan C. Ervin

Chief Counsel

¹ Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1997).

² By your letter of October 16, 1997, you state that you have been authorized to represent the LP with respect to the relief requested herein.

³ Specifically, these family members are A's parents and grandmother.

⁴ You represent that the Pool may in the future admit certain additional investors who are business associates of A and who are QEPs.

⁵ Specifically, the family members include A's parents, two sisters, two uncles and their wives and two of the children of one of his uncles (i.e., two of A's cousins).

⁶ A's grandmother, a general partner of the LP, gifted the limited partnership interests to each of the limited partners. No investment decision or investment was made by any of the limited partners. You represent that the health care facility is Y, a health care facility for retired nuns (the "Y Center"). The Y Center has a one percent interest in the LP with a value of approximately \$46,000. As noted above, this interest and all other interests in the LP were gifts from A's grandmother.

⁷ 7 U.S.C. §12a(2) or 12a(3) (1994).

⁸ However, you represent that if an additional grandchild were born, A's grandmother might wish to include the new grandchild (or a trust for the benefit of such grandchild) as a limited partner of the LP.

⁹ 7 U.S.C. §6m(1) (1994).